

TOWN OF DAVIE
TOWN COUNCIL AGENDA REPORT

TO: Mayor and Councilmembers

FROM/PHONE: Herb Hyman/1016

PREPARED BY: Herb Hyman

SUBJECT: Resolution

AFFECTED DISTRICT: All

ITEM REQUEST: Schedule for Council Meeting

TITLE OF AGENDA ITEM: CONTRACT - A RESOLUTION OF THE TOWN OF DAVIE, FLORIDA, AUTHORIZING THE MAYOR TO EXECUTE A CONTRACT WITH PEPSI-COLA BOTTLING OF FT. LAUDERDALE-PALM BEACH, INC. FOR AN EXCLUSIVE BEVERAGE AGREEMENT.

REPORT IN BRIEF: The Town desires to have an exclusive beverage agreement and solicited proposals for such an agreement. The Town sent out specifications to ten (10) prospective respondents. Additionally, the opportunity was advertised in the Sun-Sentinel and posted on the Town's website. The Town received one (1) response. The contract would obligate the Town's concessionaires to buy only Pepsi-Cola products and all vending machines would vend only Pepsi-Cola products. In return, the Town would receive a one-time \$20,000 sponsorship fee from Pepsi-Cola to be used in any way that the Town sees fit. Additionally, the Town would receive 10% of all vending machine sales paid on a monthly basis. The Town's existing contracts with our concessionaires contractually obligates them to honor any exclusive beverage agreement that exists during their contract term. The vending machines would be operated and maintained by Pepsi-Cola. The contract term is seven (7) years.

PREVIOUS ACTIONS: n/a

CONCURRENCES: The agreement has been reviewed and approved by the Town Attorney under control number 0221090609.

FISCAL IMPACT: not applicable

Has request been budgeted? n/a

If yes, expected cost: n/a

Account name and number: n/a

Additional Comments: The exclusive beverage agreement will result in a one-time \$20,000 sponsorship and 10% of all gross sales from the vending machines projected to be approximately \$3,000/yr. for the entire contract term.

RECOMMENDATION(S): Motion to approve resolution

Attachment(s):

Contract document

Procurement Authorization

Incorporation documentation

RESOLUTION NO. _____

A RESOLUTION OF THE TOWN OF DAVIE, FLORIDA,
AUTHORIZING THE MAYOR TO EXECUTE A CONTRACT WITH
PEPSI-COLA BOTTLING OF FT. LAUDERDALE-PALM BEACH,
INC. FOR AN EXCLUSIVE BEVERAGE AGREEMENT.

WHEREAS, the Town desires to have an exclusive beverage agreement; and

WHEREAS, the Town solicited proposals for such an agreement; and

WHEREAS, after review, the Town Council authorizes the Mayor to execute a
contract with Pepsi-Cola Bottling of Ft. Lauderdale-Palm Beach, Inc.

NOW, THEREFORE, BE IT RESOLVED BY THE TOWN COUNCIL OF THE TOWN
OF DAVIE, FLORIDA:

SECTION 1. The Town Council authorizes the Mayor to execute a contract with
Pepsi-Cola Bottling of Ft. Lauderdale-Palm Beach, Inc. for an exclusive beverage
agreement which is attached hereto and identified as Attachment "A".

SECTION 2. The contract term is seven (7) years.

SECTION 3. This resolution shall take effect immediately upon its passage and
adoption.

PASSED AND ADOPTED THIS _____ DAY OF
_____, 2009

MBER
Attest:

MAYOR/COUNCILME

TOWN CLERK

APPROVED THIS _____ DAY OF _____, 2009



Pepsi Cola Bottling Company of Ft. Lauderdale-Palm Beach, Inc.

This Beverage Agreement (the "Agreement") is made this _____ day of _____, 2009 by and between Pepsi-Cola Bottling Company of Ft. Lauderdale-Palm Beach, Inc. ("Pepsi") with offices located at 2121 NW 15th Ave, Pompano Beach, FL 33069, Vending Americas with offices at 2121 NW 15th Ave, Pompano Beach, FL 33069 and The Town of Davie, with offices located at 6591 Orange Drive, Davie, FL 33314 (the "Customer").

WHEREAS, Customer and Pepsi each desire that Pepsi, through its Brands (as hereinafter defined), serve as the sole, exclusive and official Beverage (as hereinafter defined) supplier, distributor and advertiser of Customer at each and every location owned and operated, controlled or utilized by the Customer including, but not limited to, each and every location, Beverage fountain and vending location, special events area, concession vending area and any and all other areas and locations that become operational during the term of this Agreement (the "Facilities").

NOW THEREFORE, in consideration of the mutual covenants Pepsi and Customer hereby agree as follows:

1. Beverages shall be defined as any and all non-alcoholic drinks except hot brewed coffee, hot brewed tea and milk.
2. Brands shall mean any and all Beverages sold and distributed by Pepsi and any and all Beverages Pepsi may sell or distribute in the future including, but not limited to, carbonated soft drinks, non-carbonated soft drinks, juices, juice containing beverages, teas, sports or isotonic drinks, bottled waters, energy drinks and bottled coffees.
3. Subject to the renewal provisions set forth herein below, the term of this seven (7) year Agreement shall commence on _____, 1, 2009 and terminate on _____, 30, 2016, or when Customer has purchased 10,500 cases of bottles and cans & 1,750 gallons of BIB postmix (the "Benchmark Requirement"), whichever comes last ("Term"). The Benchmark Requirement shall consist of a total of 10,500 cases of bottles and cans & 1,750 gallons BIB postmix including full service cases. All funding provided by Pepsi in Paragraph 5 of this Agreement shall terminate on the end date of the Term, _____, 30, 2009; however, Customer shall be required to honor the terms and conditions of the Agreement until the Benchmark Requirement has been met.
4. Customer grants to Pepsi the right of first refusal to serve as the sole, exclusive and official Beverage sponsor, supplier, distributor, advertiser and promoter to Customer and the Facilities for the seven (7) year period immediately following the expiration of this Agreement upon such conditions as the parties mutually agree.
5. In exchange for Customer's seven (7) year commitment and other valuable consideration and upon full execution of this Agreement, the parties agree as follows:
 - a. Pepsi agrees to pay Customer a one time upfront payment of Twenty Thousand (\$20,000.00) Dollars within sixty (60) days after full execution of this Agreement.
 - b. Initial vend pricing and commission structure on full-service vending products will be as follows:
 - \$1.25 vend rate with 10 percent commission
 - \$1.50 vend rate with 10 percent commission
 - Snack Machine pricing varies with 10 percent commission

Vending Americas shall pay to Customer the percentage of gross receipts as shown on Exhibit b, less the State Sales Tax and any distribution charges. Monthly payments shall be with respect to all sales made through the Machines during the calendar month preceding the payment if the total commission due to Customer exceeds \$51.00. When the net commission due does not exceed this sum, commission shall be paid during the month following the date this occurs. All checks are sent out on the 14th of each month. A report will outline by asset, units sold, revenue and commission paid. Commissions and initial pricing on any additional products introduced during the Term shall be determined at the time of introduction. Vend price changes shall be mutually agreed upon by Vending Americas and Customer.

c. Pepsi will provide the following equipment for initial setup:

- 10 Full Service CSD Vending machines
- 5 Single Door Coolers
- 3 Double Door Coolers
- 5 Counter Top coolers
- 2 Drop-In Fountains

All equipment will be placed and setup by Pepsi.

d. Pepsi agrees that to pay Customer a growth rebate of \$1.50 per case on all 12 pk or 24 pk cases purchased in excess of the 1500 cases, and \$.50 per gallon on all gallons purchased in excess of 250 gallons in any given Agreement year during the Term. Rebate payments shall be made within sixty (60) days after the anniversary date of each year of this Agreement based on the immediately prior year's purchases.

6. All payments, including the value of donations, made by Pepsi to Customer under Paragraph 5 of this Agreement shall be deemed earned at an equal prorated rate per month for the purposes of this Agreement, notwithstanding the date of actual payment.

7. Customer hereby licenses and appoints Pepsi, through its Brands, as the sole, exclusive and official Beverage supplier, distributor and advertiser of Customer and the Facilities. Customer shall cause the Brands to be exclusively available at the Facilities and no Beverages or Beverage related items including, but not limited to, cups or premium items, that compete with or are the same as or similar to the Brands shall be made available, advertised and/or promoted at the Facilities or by Customer.

8. Customer recognizes that Pepsi has paid valuable consideration to ensure an exclusive Beverage associational relationship with Customer with respect to an exclusive Beverage supply and distribution program and that any dilution or diminution of such exclusivity seriously impairs Pepsi's valuable rights. Accordingly, in the event another person or entity attempts, without Pepsi's explicit consent, to associate Beverages that compete with or are the same as or similar to the Brands ("Competitive Products") with Customer or to suggest that Competitive Products are endorsed by or associated with Customer by referring directly or indirectly to Customer (all of which actions described herein are sometimes referred to as "Ambush Marketing"), Customer will promptly oppose such actions and cooperate with Pepsi's efforts to stop the Ambush Marketing and to protect the exclusive associational rights granted to Pepsi in this Agreement. In the event any such Ambush Marketing occurs during the Term or any renewal thereof, immediately upon learning thereof, each party shall notify the other party hereto.

9. All art work and logo sheets to be used in any advertisements, signage and press releases promoting the Brands are subject to the prior mutual approval of Pepsi and Customer, with neither party unreasonably withholding such approval.

10. Except as may otherwise be required by this Agreement, law or legal process, no party shall disclose to any third party the terms and conditions of this Agreement.

11. Except if prohibited by law, during the entire Term, Pepsi shall provide and supply Customer with all necessary equipment to dispense the Brands at the Facilities without charge; provided that all Beverages are supplied to Customer and the Facilities by Pepsi as set forth above and that the only products dispensed from such equipment are the Brands. Pepsi will provide service on all equipment without charge to Customer. All rights, title and interest in all Pepsi equipment supplied to Customer shall at all times remain with Pepsi.

12. Customer represents and warrants to Pepsi that all appropriate approvals required to enter into this Agreement have been granted and the individual executing this Agreement on behalf of Customer has been duly authorized by any and all persons or entities of which authorization is required to enter into this Agreement on behalf of Customer. Customer also agrees that at no time will it challenge, contest, disclaim or deny the authority of the individual signing this Agreement on behalf of Customer or use as a basis to void, cancel or nullify this Agreement a claim that the individual signing below was not authorized to sign this Agreement on behalf of Customer. Further, Customer guarantees and warrants that the execution, delivery and performance of this Agreement by Customer will not and does not violate any agreements with or the rights of third parties.

13. In the event any of the covenants, agreements, terms or provisions contained in this Agreement shall be invalid, illegal or unenforceable in any respect, the validity of the remaining covenants, agreements, terms and provisions contained herein shall not in any way be affected, prejudiced or disturbed thereby.

14. If Customer fails to perform any of the promises set forth in this Agreement, then as an option but not as its sole remedy, Pepsi may terminate this Agreement. If this Agreement is terminated for any reason, Customer agrees to return to Pepsi a pro rata portion of all monetary payments, including the value of donations, made to but not earned by Customer under Paragraphs 5 of this Agreement. Further, any such breach by Customer shall be deemed as authorization to Pepsi to allow Pepsi immediate access to the Facilities to take possession of each and every piece of Pepsi's equipment without any claim of trespass.

15. Any failure by either party hereto to enforce at any time or for any period of time any one or more of the terms or conditions of this Agreement, shall not be a waiver of such terms or conditions or of either party's right thereafter to enforce each and every term and condition of this Agreement.

16. It is mutually understood and agreed, and it is the intent of Pepsi and Customer that an independent contractor relationship be established and is hereby established under the terms and conditions of this Agreement: that employees of Customer are not, nor shall they be deemed to be, employees of Pepsi; and, that employees of Pepsi are not nor shall they be deemed to be employees of Customer.

17. Neither this Agreement nor any rights under this Agreement may be assigned or otherwise transferred by either party in whole or in part, whether voluntarily or by operation of law, except by way of sale of assets, merger or consolidation, without the prior written consent of the other party, which consent shall not be unreasonably withheld. Subject to the foregoing, this Agreement will be binding upon and will inure to the benefit of the parties and their respective successors and assigns.

18. The internal laws of the state of Florida shall govern the validity, construction and enforceability of this Agreement. The Parties agree to use the State of ~~Indiana~~ ^{FLORIDA} for Jurisdiction and any claim, objection or dispute arising out of the terms of this Agreement shall be litigated in the Seventeenth Judicial Circuit in and for Broward County, Florida. The prevailing party to any



resultant judgment shall be entitled to an award of all reasonable attorney's fees, paralegal expenses, interest and court costs incurred by such prevailing party against the losing party.

19. This Agreement fully expresses the entire understanding of Pepsi and Customer. Any and all prior understandings are hereby canceled. No future changes in the terms of this Agreement shall be valid, except when and if reduced to writing and signed by both Pepsi and Customer, by legally authorized officials thereof.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the date and year first above written.

The Town of Davie

**Pepsi Cola Bottling Company of Ft.
Lauderdale- Palm Beach, Inc./ Vending
Americas**

By: _____

Name: _____

Title: _____

By: *Mercedes Peebles*

Name: Mercedes Peebles

Title: Foodservice Representative

By: _____

Name: _____

Title: _____

By: *ND*

Name: Neil Donnelly

Title: Key Account Manager Vending Americas